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6 *Attorneys for Legal Scholars as Amici Curiae*

7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

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11 NATIONAL SHOOTING) NO. 2:23-cv-00113-MKD
12 SPORTS FOUNDATION, INC.,)
13 Plaintiff,) **LEGAL SCHOLARS'**
14 v.) **UNOPPOSED MOTION FOR**
15) **LEAVE TO FILE *AMICI***
16 ROBERT W. FERGUSON,) **CURIAE BRIEF**
17 Attorney General of the State of)
18 Washington,)
19 Defendant.)
20 _____

21 The law professors identified in Appendix A (the "Legal Scholars")
22 respectfully submit this memorandum of law in support of their **unopposed** motion
23 for leave to file an *amici curiae* brief in support of defendant's opposition to
24 plaintiff's National Shooting Sports Foundation's ("NSSF") motion for a
25 preliminary injunction.
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1 A. **The Legal Standard for a Motion for Leave to File an *Amici Curiae* Brief**

3 District courts have broad discretion to permit non-parties to
 4 participate in an action as *amici curiae*, and generally courts have “exercised great
 5 liberality” in allowing *amicus* briefs. *El Papel LLC v. Inslee*, No. 22-cv-01323,
 6 2020 WL 6158825, at *1 (W.D. Wash. Oct. 21, 2020) (internal citation and
 7 quotation marks omitted); *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. 06-
 8 cv-1254, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007) (same). District courts
 9 frequently accept *amicus* briefs from non-parties where the briefs “supplement and
 10 assist in cases of general public interest, supplement the efforts of counsel, and
 11 draw the court’s attention to law that might otherwise escape consideration.” *Cmty.
 12 Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d
 13 974, 975 (E.D. Wash. 1999). There are no strict prerequisites that must be
 14 established to qualify for *amicus* status; an applicant must merely make a showing
 15 that its “participation is useful to or otherwise desirable to the court.” *WildEarth
 16 Guardians v. Haaland*, 561 F. Supp. 3d 890, 905 (C.D. Cal. 2021), appeal
 17 dismissed, No. 21-56316, 2022 WL 2031684 (9th Cir. Feb. 1, 2022) (internal
 18 citation and quotation marks omitted).

23 B. ***Amici Curiae’s Expertise Will Assist in the Court’s Consideration of
 24 Plaintiff’s Motion for a Preliminary Injunction***

25 As explained in the proposed brief, the *amici*, all of whom are
 26 independent of the parties to this action, are law professors and scholars who have
 27 a professional interest in the issues presented on this case. Based on their

1 scholarship, *amici* are able to present learned perspectives on multiple issues
2 relevant to the determination of plaintiff's motion for a preliminary injunction. In
3 particular, *amici* have researched, studied, and taught in the areas of torts, statutory
4 interpretation, constitutional law, and firearms regulation – all of which are
5 implicated by the plaintiff's motion.

6 *Amici*'s proposed brief draws on these areas of scholarship to address
7 important questions regarding the scope and application of the Protection of Lawful
8 Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901–7903. The principal
9 authors of the proposed brief, Professor Hillel Y. Levin and Professor Timothy D.
10 Lytton,¹ are among the nation's leading scholars of PLCAA, and recently authored
11 a prominent article regarding the constitutional principles that inform that statute.
12 See Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity:*
13 *Separation of Powers, Federalism, and the Second Amendment*, forthcoming 75
14 FL. L. REV. (available at SSRN). As Professors Levin and Lytton explain at length
15 in their article, PLCAA has been misunderstood and misinterpreted by litigants,
16 commentators, and some courts. Their scholarship – and the proposed brief that
17 they submit with this motion – attempts to correct those interpretive errors and
18 promote a uniform and correct interpretation of PLCAA.

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25 ¹ Professor Levin is the Alex W. Smith Professor of Law at University of
26 Georgia School of Law and Professor Lytton is a Distinguished University
27 Professor and Professor of Law at Georgia State University College of Law.

1 The proposed brief will assist the Court in evaluating three issues
2 implicated by plaintiff's motion for a preliminary injunction.
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4 *First*, drawing on the Legal Scholars' expertise in statutory
5 interpretation, the proposed brief demonstrates that Washington Substitute Senate
6 Bill 5078 ("SB 5078") unambiguously qualifies as a "predicate statute" according
7 to the plain text of PLCAA.²

8 *Second*, drawing on the Legal Scholars' expertise in constitutional
9 law, the proposed brief establishes that liability for violation of SB 5078 under
10 PLCAA's predicate exception would be entirely consistent with PLCAA's overall
11 structure. More specifically, the Legal Scholars explain that PLCAA establishes a
12 statutory scheme that serves three constitutional principles: the individual right to
13 keep and bear arms, the separation of powers, and federalism. Many courts and
14 commentators – and the NSSF in this case – have misconstrued the structural
15 relationship between these principles and the text of PLCAA's predicate exception.
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17 ² The predicate exception is codified at 15 U.S.C. § 7903(5)(A)(iii). Under the
18 predicate exception, PLCAA does not preempt "an action in which a
19 manufacturer or seller . . . knowingly violated a State or Federal statute applicable
20 to the sale or marketing of the product, and the violation was a proximate cause of
21 the harm for which relief is sought." *Id.* This provision is known as the "predicate
22 exception" because it rests on a defendant's violation of an underlying, or
23 "predicate," statute.

1 Third, drawing on their expertise in tort law and statutory
 2 interpretation, the Legal Scholars refute the NSSF’s argument that SB 5078 cannot
 3 serve as predicate statute because it imposes a general duty of care on firearms
 4 industry members to establish “reasonable controls” to prevent third-party misuse
 5 of its products. As the Legal Scholars explain, standards of conduct like the
 6 reasonable care standard imposed by SB 5078 are susceptible to knowing violation
 7 and thus can be predicate statutes. This is confirmed by the Legal Scholars’ careful
 8 analysis of the examples that Congress included in the predicate exception (15
 9 U.S.C. § 7903(5)(A)(iii)(I) & (II)) as well as several exceptions to PLCAA other
 10 than the predicate exception (15 U.S.C. § 7903(5)(A)(i)-(vi)).

13 Based on their expertise, scholarship, and experience in the fields of
 14 torts, statutory interpretation, constitutional law, and firearms regulation, *amici*
 15 meet the broad discretionary standard for filing an *amicus curiae* brief. *See Woodfin*
 16 *Suite Hotels, LLC v. City of Emeryville*, No. 06-cv-1254, 2007 WL 81911, at *3.
 17 As discussed above, their proposed brief will be useful to the Court because it
 18 addresses important issues regarding PLCAA’s scope and application through the
 19 lens of the Legal Scholars’ areas of scholarship and teaching. Moreover, the
 20 potential ramifications of this Court’s interpretation of PLCAA go far beyond the
 21 parties, as several other states have enacted public nuisance laws like SB 5078, and
 22 a number of those laws are currently subject to challenge by the NSSF.³ Indeed,

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 27 ³ *See NSSF v. Kathy Jennings, Attorney General of the State of Delaware*, No.
 28 22-cv-1499 (D. Del. filed 2022); *NSSF v. Matthew Platkin, Attorney General of*

1 the Legal Scholars have submitted an unopposed *amici curiae* brief to the Third
2 Circuit raising similar arguments in connection with the NSSF's challenge to New
3 Jersey's public nuisance statute. The Legal Scholars' proposed brief therefore also
4 aids the Court by ensuring that the same legal doctrines explained to the Third
5 Circuit are also before the Court here, where the same federal statute (PLCAA) is
6 under consideration.

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New Jersey, No. 22-cv-6646 (D.N.J. filed 2022), on appeal at No. 23-1214 (3d Cir.); *NSSF v. Rob Bonta, Attorney General of California*, No. 23-cv-945 (S.D. Cal. filed 2023).

CONCLUSION

For the foregoing reasons, the Legal Scholars' unopposed motion for leave to file an *amici curiae* brief should be granted.

Dated: June 7, 2023

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By: /s/ William D. Marler

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CERTIFICATE OF SERVICE

On the 7th day of June, 2023, I caused to be served, via ECF electronic service, a true copy of the foregoing Unopposed Motion for Leave to File *Amici Curiae* Brief upon all counsel registered for e-service.

DATED this 7th day of June, 2023

s/ William D. Marler
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